No. 15,626

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG HO, as Guardian ad Litem of Wong Kwok Wei,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The plaintiff-appellant, by his guardian ad litem, filed in the United States District Court for the Northern District of California, Southern Division, a petition seeking a declaratory judgment of United States citizenship. Pursuant to stipulation and approval of the District Court, said action was transferred to the United States District Court for the Southern District of California, Central Division (T. 15). Such action was commenced in accordance with the provisions of former Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C.A. 903).

The District Court denied plaintiff's petition for a declaratory judgment (T. 17-21), and the plaintiff appealed (T. 25). Jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C.A. 1291 and 1292.

STATUTES INVOLVED.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934 (48 Stat. 797) reads:

> "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or mother, as the case may be, has resided in the United States, previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."[1]

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[1]The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, in so far as pertinent here:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *"[2]

STATEMENT OF THE CASE.

The action for declaratory judgments of United States Nationality was commenced by Wong Kwok Keung and Wong Ho as guardian ad litem for Wong Kwok Wei pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903), now repealed, and substantially included in Section 360 of

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and twenty-one years (8 U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years (8 U.S.C. 1401(b)(c)).

[2]This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending before the new Act became effective (66 Stat. 280).

the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1503).

Both plaintiffs filed with the American Consulate General at Hong Kong, on or about March 8, 1950, an application for issuance of a United States Passport or travel document, claiming that they, and each of them, were the foreign born sons of an American citizen and acquired United States nationality at birth under the provisions of Section 1993, United States Revised Statutes (2 Stat. 153) which was in effect at the time of birth of Wong Kwok Keung, and the same Act as amended by the Act of May 24, 1934 (48 Stat. 797; 8 U.S.C.A. 1401) which was in effect at the time of the birth of the plaintiff-appellant, Wong Kwok Wei. After it was determined by the American Consulate General that the two plaintiffs in the Court action below could not establish their identity and claim to United States nationality, this action was commenced. During the course of trial it was stipulated that the plaintiffs, and each of them, were denied a right or privilege as nationals of the United States on the ground that they were not nationals by the American Consulate General at Hong Kong, an official executive of the defendant herein (T. 45).

The case came to trial without a jury. The appellant, his brother Wong Kwok Keung, also a plaintiff in the Court below, his father Wong Ho and his brothers, Wong Kwok Foo and Wong Kwok Hoy, testified concerning the claimed relationship. In opposition and over objection of counsel, the defendant offered, and the Court admitted, a deposition (Exhibit

C; T. 175-7) of an expert witness taken in Hong Kong, British Crown Colony.

In summing up the evidence introduced during the course of trial, the lower Court stated:

> "Mr. Hertogs, as I said before, and I reiterate, and I hope if the case is taken up to the Circuit you will underline my reiteration, if it wasn't for this deposition, I would hold in favor of the plaintiff, because I was satisfied with the testimony of the plaintiff's witnesses. I would have held for the plaintiff from the bench, I wouldn't have had to study the record, because I was satisfied, but in the light of that deposition and the findings of the doctor, which has been substantiated by the doctor who testified today, I don't see how I can get around the finding as to his bone age." (T. 263.)

Accordingly, judgment was entered declaring the plaintiff Wong Kwok Keung is now and ever since his birth has been a national of the United States (T. 22-25), and for defendant against the plaintiff-appellant, Wong Kwok Wei. It is from the latter judgment denying the claim of Wong Kwok Wei that the said plaintiff-appellant prosecutes this appeal.

SPECIFICATION OF ERROR.

1. The District Court erred in admitting, over objection, defendant's Exhibit C.

2. The District Court erred in concluding that the plaintiff-appellant, Wong Kwok Wei, is not a United States citizen.

ARGUMENT.

1. ERRONEOUS ADMISSION OF EXHIBIT C.

It is well established that the burden of proof upon the plaintiffs in actions filed under Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) is the ordinary one resting upon plaintiffs in a civil action.

Wong Gong Fay v. Brownell, 9 Cir., 228 F2d 1;
Chow Sing v. Brownell, 9 Cir., 235 F2d 602.

Appellant and his brother Wong Kwok Keung were both plaintiffs in the court action below. At the conclusion of the trial a declaratory judgment of United States nationality was entered in favor of Wong Kwok Keung (T. 22-25), and, as heretofore stated, the trial Court denied appellant's petition after stating that

> "If it wasn't for this deposition, I would hold in favor of the plaintiff, because I was satisfied with the testimony of the plaintiff's witnesses." (T. 263.)

Since no appeal was filed in the case of Wong Kwok Keung, it appears that the Government concedes that Wong Ho, appellant's claimed father, is a United States citizen who resided in the United States prior to the birth of the appellant herein. If the relationship of the appellant to the said Wong Ho has been established in accordance with the rule of evidence set forth above, it must be deemed that appellant acquired United States citizenship/nationality at the time of his birth under the statutes then in effect (supra, p. 2).

As pointed out by the trial Court, plaintiff and his witnesses resembled a family unit. In addition to the

appellant and his plaintiff brother, Wong Ho, their father, and two recognized United States citizen brothers testified in their behalf. It was stipulated and agreed (T. 125) that Wong Ho made a temporary trip to China, departing on May 30, 1934 and returning to the United States on June 23, 1937. The appellant claims to have been born at the Chung Hing Village, Toyshan District, China on April 30, 1935. The witnesses, Wong Ho, Wong Kwok Keung and Wong Kwok Foo, all testified that they were present in the Chung Hing Village at the time of the birth of appellant herein (T. 142, 116, 65-66). When examined by the Immigration and Naturalization Service upon his return to the United States in June of 1937, Wong Ho then testified that he had a son named Wong Kwok Wei who was born at the Chung Hing Village on April 30, 1935 (Exh. 10(c)). He stated that the appellant herein is the person that he identified at that time. All parties concerned have likewise identified the appellant in Exhibits 3(a), 3(e), 6 and 8.

Appellant and his brother, Wonk Kwok Keung, were both issued certificates of identity under the provisions of Section 503 of the Nationality Act of 1940 by the American Consulate General at Hong Kong on January 21, 1952 (Exhibits 5 and 6). Both were admitted to the United States pending outcome of the Court proceedings, by the Immigration and Naturalization Service on January 28, 1952. Shortly after their arrival (February 21, 1952), it was stipulated and agreed, by and between the parties hereto through their respective attorneys that the appellant Wong

Kwok Wei would submit to a medical and radiological examination to be conducted by the United States Public Health Service at San Francisco, California, pursuant to the provisions of Rule 35 of the Federal Rules of Civil Procedure (Exhibit 12). At the time of trial appellee's counsel stated:

> "Why the examination wasn't taken at that time, I have no way of knowing in any form or fashion. The only thing that the Public Health Service up there reported is that they have no record of the examination or whether one was taken and lost."

Under date of October 5, 1956, counsel for appellee notified counsel for appellant of its intention of taking a deposition on oral examination of one Dr. I. S. Bergius in Hong Kong on November 5, 1956 (T. 16). The deposition of Dr. Bergius, taken pursuant to the notice set forth above, was admitted in evidence as Exhibit C (T. 177) over objection of counsel (T. 175-6; 253).

Legal grounds for admitting Exhibit C are not stated. Apparently it was offered and admitted as within the authorization of Rule 26(d)(3) of the Federal Rules of Civil Procedure. Rule 26(d) of the Federal Rules of Civil Procedure (28 U.S.C.A.) provides as follows:

> "(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who

had due notice thereof, in accordance with any one of the following provisions:

* * * * * * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

The quoted rule indicates by its specific language that generally a witness shall be examined on oral testimony and that wherever possible a trial by deposition alone should be avoided. The issue presented here is whether the deposition of an "expert", expressing a medical opinion, is admissible where the "expert" resides at a greater distance than 100 miles from the place of trial, even though a great number of equally qualified experts are available at the place of trial. Counsel has made a diligent search for judicial precedents relating specifically to this matter, but none has been found.

The Federal Rules of Civil Procedure relating to depositions and discovery were enacted for a two-fold purpose, first—to ascertain facts and to procure evidence, or to secure information as to where such evidence could be obtained, and second—to narrow the triable issues. The right to use depositions for discovery or for limited purposes at a trial of course does not mean that depositions are admissible under all circumstances. An excellent summary relating to the history and purposes of those provisions was set forth by Justice Frank of the Second Circuit in *Arnstein v. Porter,* 154 F2d 464, 471, 472.

Normally, a witness cannot be allowed to testify as to any fact of which he has no personal knowledge. One exception to this rule is testimony of experts. The theory upon which expert testimony is excepted from the opinion evidence rule is that such testimony serves to inform the Court about affairs not within the full understanding of the average man.

Farris v. Interstate Circuit, 5 Cir., 116 F2d 409, 412;

Wigmore on Evidence, Second Edition, Volume 4, pages 118, 119.

It would appear that the rules were modified to permit the introduction of depositions in limited circumstances to prevent injustice, where such depositions are offered as a witness to matters of which the deponent alone had knowledge—in other words, to admit depositions relating to a subject matter which could not be proven without the deponent's testimony. Neither of these criteria are present in the instant matter.

Dr. Bergius, the dependent in Exhibit C, had no personal knowledge concerning the relationship or chronological age of the appellant. Matter of fact, at this time we would like to point out that Dr. Bergius was wholly lacking in any technical skill or education relating to the field of radiology. He was not qualified as an expert and his own testimony indicates strongly that he was not an expert on the subject of inquiry. Certainly qualified experts were readily available to testify on oral examination at the time of trial.

No injustice or unfairness would have resulted if the trial Court had rejected the deposition admitted as Exhibit C. Whereas, on the other hand, the admission of that document definitely was prejudicial to the case of the appellant, since he was denied the right to cross-examine the witness before the trial Court. Even though the same question was not presented, we believe that the statement of Judge Mathes in *Jeffries v. Olesen* (D.C., Cal.), 121 F. Supp. 463, 476, is appropriate:

> "At the trial of the case at bar, evidence of plaintiff and his medical witnesses was received for the limited purpose of permitting plaintiff to show that denial of his application to transfer the hearing to Los Angeles was, under the circumstances, not merely a technical denial of procedural due process, but resulted in material prejudice to his defense in the administrative proceedings. Cf. Coe v. Armour Fertilizer Works, 1915, 237 U.S. 413, 424, 35 S. Ct. 625, 59 L. Ed. 1027; Rees v. City of Watertown, 1873, 19 Wall. 107, 86 U.S. 107, 123, 22 L. Ed. 72. It was sufficient for such purpose merely to show that the Hearing Examiner's

> rejection of the application to transfer had the effect of denying to plaintiff the right of cross-examination on the opinions expressed by the medical witness called to give testimony in support of the administrative complaint. Cf. Reilly v. Pinkus, supra, 338 U.S. at pages 275-276, 70 S. Ct. 110; Shaw v. Duncan, supra, 194 F2d at pages 782-783."

It is asserted that admission of a deposition of this nature contravenes the language of Rule 1 of the Federal Rules of Civil Procedure which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The deposition of an expert taken thousands of miles from the place of trial, when more qualified experts are readily available at the place of trial, negates the foregoing provisions. If such deposition was improperly admitted, then the provisions of Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules" have been disregarded.

For the reasons set forth above, the decision of the Court below must be deemed erroneous as a matter of law.

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2. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE APPELLANT IS NOT A UNITED STATES CITIZEN.

The decision of the Court below denying the claim of this appellant is predicated upon expert medical opinion which holds that the bone development of

the appellant is younger than the chronological age claimed.

The Courts, the Board of Immigration Appeals and medical authorities have all stated at various times that there is a wide variation in the normal bone growth of different individuals. The medical basis for the expert opinion is the fact that fusion or ossification of certain bones in the human body occurs at an approximate age in normal individuals. However, all of the authorities relied upon in justification of this determination are based upon actual studies made of individuals of the Caucasian race. It is questionable whether the same studies are applicable to a person of the Chinese race. It must be noted that dates given as a result of x-ray examinations are in any case no more than approximation made by medical estimate based upon the growth of normal individuals, and that considerable variation occurs in individuals depending on environment, especially diet, minor ailments, glandular development and also on hereditary influences.

See:

Mainland, Anatomy, 1945, pages 88-91;
Cohn, Normal Bones and Joints, 1924, pages 5, 10;
"Normal Bone Growth", Pillmore, Clinical Radiology, 1946.

Even though the issues presented in each case are different, an examination of Court decisions relating to this matter is helpful. In *Carmichael v. Wong Choon Ock,* 119 F2d 173, at page 174, this Court stated:

"The court below held, and we agree, that this action of the immigration authorities was manifestly unfair. Compare *Gung You v. Nagle,* 9 Cir., 34 F2d 848, 853, *Ex parte Chung Thet Poy,* D.C., 13 F2d 262, affirmed in *Johnson v. Chung Jeng ex rel. Chung Thet Poy,* 1 Cir., 16 F2d 1018, *Ward v. Flynn,* 1 Cir., 74 F2d 145, 146. In *Hom Ark v. Carr,* 9 Cir., 105 F2d 607, cited by appellant, no witness testified from personal knowledge that the applicant was a son of his alleged father. Here there was positive, uncontradicted eyewitness testimony which, in our opinion the immigration authorities had no right to disregard."

On petition for rehearing in *Carmichael v. Wong Choon Ock,* 122 F2d 829, Judge Denman said:

"* * * It is quite possible my refusal to give weight to the testimony of experts is based upon my belief their conclusions rest on averages of the observed cases. Such averages include extremes which well might cover the physical conditions of the appellant. At ten years of age, because of my size, I was excluded from footraces for boys under fourteen. . . .

"This is written with a full appreciation of the auditor's amused tolerance of the mature, relating their early animal vigor, as recalled through the distant perspective of their childhood. However, I have no doubt that if I, at ten years of age and with yellow skin and Mongoloid features, had then arrived from China and sought to establish under the present law my right to enter my country, as is this lad, Wong Choon Ock, and had been subject to the same expert testimony,

my citizenship wrongfully would have been denied."

In *Chin Ten Teung v. Ward,* 30 F. Supp. 670, the Court rejected medical evidence that appellant was about five years older than he claimed. The Court states at pages 670, 671:

> "This son of a citizen is denied admission because a medical examiner, who examined him and X-ray pictures, testified that he was 20 to 21 years of age. The medical examiner was obliged to admit that he was not qualified to say whether his theories respecting skeletal development would hold in the case of one of the Chinese race. There was medical evidence before the Board to the effect that age could not be accurately determined by the degree of ossification. A doctor testified that 'The reason why I have this conclusion is due to the fact that every author that has done research work on the epiphyses will not state definitely that the epiphyses unite at the definite time due to the fact that these epiphyses are affected by sunlight, fresh air, muscular exercise, diet and glandular disturbance; * * *. They are not definite in their opinion and I think I can't truthfully say the exact age and there is no one who can say the exact age of any individual within three years. * * *.'
>
> "The Board of Review had before it abundant evidence to the same effect from reputable sources, and also further evidence that the Chinese are of a very different type from the Caucasian, and that among the Chinese there is great variation in the time of junction of the epiphyses with the main part of the various bones to which they belong."

The difficulty in estimating age was aptly expressed by Judge Garrecht in his dissenting opinion in *Kong Din Quong v. Haff,* 122 F2d 96, at page 99:

> "In the absence of authentic and reliable birth records proof of age is difficult to establish. It is common experience that the appearance of a person is very deceiving in estimating age; some people mature earlier than others; some appear older that they really are, others younger. Then there seems to be a general suspicion that people are older than they say. This vagueness and uncertainty is augmented in the case of persons of another race, born and reared in another part of the world, subject to a different climate, diet and environment. An order of exclusion based upon a slight difference between the age claimed and the age suspected or guessed at would be unreasonable."

Also see:

Hom Ark v. Carr, 105 F2d 607, 610;
Fong On v. Day, 54 F2d 990;
Woo Hoo v. White, 243 Fed. 541.

Similar decisions have also been rendered by the administrative officials charged with enforcement of the immigration and nationality laws of the United States. In a precedent decision, *In re Chin Gim Ton,* A 6 621 397, decided June 6, 1947, the Board of Immigration Appeals, after reviewing the above-cited judicial authorities, stated:

> "The difference in age between that claimed by the appellant and the estimate of the Public Health Service ranges from four to eight years.

> The difference between the claimed age and the estimates of the Board of Special Inquiry members ranges from three to eight years. It is, however, possible that the Board of Special Inquiry members in reaching their conclusions were influenced by the medical report which had already been introduced in evidence. We have seen that the examination of appellant's teeth, as set forth in the medical report, is inconsistent with the conclusion of the Public Health surgeons that he might be as young as ten or eleven years. The condition of his teeth is more consistent with an age of fourteen. We take the medical report as an estimate that appellant is fourteen years old and hence the difference becomes one of about four years. In view of appellant's undernourished condition, and the variation resulting from racial, environmental, and hereditary influences, we do not think the medical evidence is conclusive. The medical estimate is opinion evidence based on averages, and does not take into account extremes in individual variations from the normal. That evidence, and the impressions suggested to the members of the Board of Special Inquiry by appellant's youthful appearance, are insufficient to overcome the testimony of appellant and Ching Ming Fee."

In the "Monthly Review", Vol. VI, No. 11, page 152, an official publication of the Immigration and Naturalization Service, when considering another precedent case, *In re Chan Yip,* A 5 876 207, the Board of Immigration Appeals concluded that that applicant had established his claim to citizenship even though there was a greater difference between the claimed

chronological age and that of the expert witnesses' physiological determination than exists in the instant matter. The Commissioner of Immigration and Naturalization stated in the *Matter of Cheung Gim Hung,* A 6 771 630, that:

> "The difficulty in estimating age is apparent. Individual variations persist. In the matter of estimating age, even though by the best available method and techniques, there results an approximation and never a certainty. It would be unreasonable to enter an order of exclusion based solely on a difference between the age claimed and the maximum age appropriated, where the difference is but two years and a little over six weeks. Even where such difference was about four years, the Board of Immigration Appeals nevertheless held that the disparity was sufficiently accounted for by attendant factors of growth (Matter of Chin Gin Ton, A-6621397, June 6, 1947)."

In the *Matter of Hom Chun Wing,* A 6 846 157, where the difference between the claimed chronological age and the medical opinion showed a variance greater than that indicated in this case, the Commissioner stated in his opinion:

> "The use of roetgenograms as incontrovertible evidence would be unjust and unwarranted on a scientific basis of facts presented in this case."

In the *Matter of Gong Bo Lun,* A 5 771 670, the Commissioner stated:

> "It cannot be concluded that the medical opinion introduced in this record, by raising a doubt as to whether his claimed age is his true age, has

> so impaired or rendered incredible his testimony or that of his alleged parents, that it might be reasonably concluded that he has failed to establish the burden of proof imposed upon him under Section 23 of the Immigration Act of 1924."

Medical authorities state that in spite of the fundamental similarily of structures in all human subjects striking individual differences occur. The individuality of anatomical structure is very evident if a series of subject is examined. Matter of fact there is a wide variation in the age studies of epiphyseal union between the charts prepared by the various medical authorities. However, they all agree that the chronological age of a person may vary considerably from the physiological development state; that environment, hereditary and nutritional factors do attribute to this variation; that endocrin dysfunctions or malfunctions retard or increase the normal physiology of the human body, and that the matter of estimating bone development age even by the best available methods and techniques result in an approximation and never in a certainty.

Cohn, Normal Bones and Joints, 1924, 5, 10;
Appleton, Hamilton & Tchaeroff, Surface and Radiological Anatomy, 1946, Appendix I;
Pillmore, Clinical Radiology, 1946, Volume 2, page 474;
Mainland, Anatomy, 1945, pages 88-91.

It is interesting to note that the identical question concerning age as disclosed by physiological development was a factor at issue when Wong Kwok Foo,

appellant's fourth brother, sought admission to the United States at the time of his arrival at the Port of Seattle, Washington in 1939 (Exhibit 2; T. 58).

Testimony of all witnesses as to the essential facts concerning the birth and identity of the appellant was clear and complete. In addition, there was substantial documentary evidence identifying the appellant as the true and lawful blood son of Wong Ho, a recognized citizen of the United States. There was no major contradiction on any substantive point. The Court was convinced that the appellant and his witnesses were telling the truth and judgment would have been granted except for the deposition, Exhibit 3 (T. 260, 263). The real issue is whether such expert opinion constituted sufficient basis for rejecting the apparent truthful testimony of the witnesses and the other direct evidence establishing the claimed relationship. The father established the existence of this appellant after his birth when testifying upon the occasion of his return to the United States on June 23, 1937 (Exhibit 10(c); T. 131). The appellant's fourth brother, Wong Kwok Foo, confirmed the identity of appellant at the time of his admission to the United States in 1939, at which time appellant was approximately four years of age. The third brother, Wong Kwok Keung, who was the other plaintiff in the court action below and who accompanied the appellant to the United States, corroborated the testimony and evidence establishing the identity of this individual. The father and the two aforementioned brothers all gave eye-witness testimony regarding the birth of the

appellant herein (T. 142; 65-66; 116). Likewise, all witnesses commented on the difference in the stature of this appellant as compared to his younger brother, stating that—he was older but he was smaller (T. 72, 187, 212, 230). Appellant's second brother, Wong Kwok Hoy, was not present at the time of appellant's birth, but verified the family relationship based upon his own knowledge and personal observation gained during his trip to the family home in China from 1947 to 1949.

This Court, in *Yip Mie Jork v. Dulles,* 237 F2d 383, at page 385, stated:

> "Any court may reject evidence, but it may not do so arbitrarily. This court has on numerous occasions held that the trier of fact need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witnesses, and improbabilities and important discrepancies in the testimony. However, when uncontradicted testimony has been rejected *without* good reason, we have reversed. E.g., Gung You v. Nagle, supra; Louie Poy Hok v. Nagle, 9 Cir., 1931, 48 F2d 753."

It is asserted that the expert opinion testimony attacking the chronological age claimed by appellant is not of sufficient substantive and probative value to refute the positive and affirmative evidence establishing the identity of this appellant. Acceptance of a probability based upon a mere estimate could cause a grave injustice of denying the precious privilege of United States citizenship to one to whom it belongs by right of birth. But for this supposition the trial

Court had a "firm conviction" as to the identity and relationship of the appellant and would have granted a judgment of United States nationality to him.

CONCLUSION.

It is submitted that the findings of the Court below are "clearly erroneous" and that the judgment should be reversed.

Dated, San Francisco, California,
April 25, 1958.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.

(Appendix "A" Follows.)

Appendix "A"

Appendix "A"

Exhibit	Identified	Offered	Admitted
1	31	31	31
2	33	219	220
3	40	221	221
3-A	43	43	146-7
3-B	.....	44	44
3-C	47	49	49
3-D	49	117	117
3-E	49	54	54
3-F	49-50	117	117
3-G	50	117	118
3-H	50	221	221
3-H-1	120	.....	120
3-H-2	120	120	121
4	47	135	135
5	55	109	109
6	55	147	147
7	55-56	110	110
8	56	148	148
9	122	220	221
10	130	220	221
10-A	132	132	133
10-B	132	132	133
10-C	132	132	133
10-D	205	206	206
11	180	180	180
12	.....	218	219
13	238	253	253
14	241	253	253
A	88	89	89
B	89	.....	89
C	.....	175	177